United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2533

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

JOVANA GUARDI,

Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

Appellant's Brief

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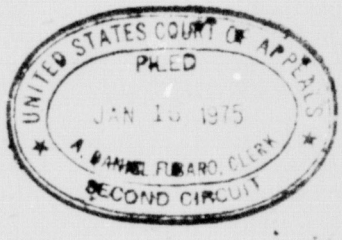

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UNITED STATES OF AMERICA,

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BRIEF FOR THE APPELLANT

PRELIMINARY STATEMENT

The appellant, Jovana Guardi appeals from a judgment of conviction in the United States District Court for the Southern District of New York (Edward Weinfeld, J.) entered on the 8th day of November, 1974 which judgment convicted the appellant of selling on two separate occasions quantities of cocaine in violation of Title 21, United States Code, Sections 812, 841 (a)(1) and 841 (b) (1) (A); Title 18, United States Code, Section 2.*

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* One count charged the appellant with possessing and distributing a Schedule II drug, cocaine hydrochloride in the amount of 31.96 grams. The second count was similar save that the amount distributed was 30.06 grams of cocaine hydrochloride.

The appellant was sentenced to concurrent prison terms of one year coupled with a three year term of special parole. Appellant has been released on bail pending the determination of this appeal

INTRODUCTION

Jovana Guardi was found to have criminally intended to sell cocaine. The defense conceded that the cocaine sales were made to Patrolman Ernest Mahone on the dates specified in the indictment. (75, 76, 12, 13)[1] The petit jury did not believe that Miss Guardi was coerced or entrapped into criminal conduct. (14)

Ordinarily such concession would be dispositive of all issues leaving no issue for appeal. This is not the case. The question of criminal responsibility was linked most directly to the testimony of Marsha Ladd, a woman of several aliases and one who was previously known to law enforcement agencies. It was the defense contention that it be allowed to cross examine Miss Ladd as if she were hostile and that extensive cross examination be permitted with respect to her prior criminal record. This the court denied and in so doing prevented a fair trial.

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1. References are to page numbers of the Appendix.

In his opening, defense counsel conceded that his client had made the two transfers of cocaine. Nevertheless, he promised to prove that Miss Guardi lacked the essential criminal intent and responsibility. His proof would show that the appellant was coerced into lawlessness by threats of physical harm and disfigurement made by Miss Ladd, also known as Marion Greenberg and Marion Ladd. (14, 75, 76) An additional defense of entrapment was interposed structured on Miss Ladd's activities as a government agent-informer. (14)

Counsel promised that the proof would show that Miss Ladd had a "vast record of criminal activities dating back to 1951", and had engaged in confidence games. (14) He would prove that she was a woman who had "done much time in penitentiary for these activities". (14) Counsel promised that the proof would show that Miss Ladd was well connected with the underworld and was a person who sought sexual gratification with the appellant. (15) The thrust of this opening was that Miss Guardi succumbed to threats of physical harm made by an experienced criminal whose sexual advances were repulsed. (15, 17)

The trial court was well aware of defense intentions. The court knew that counsel intended to probe and press Miss Ladd and expose a criminal record dating back to at least twenty years ago. The court knew that

Miss Ladd was a pillar of the defense structure, albeit a jaded one whom counsel would seek to impeach and whom the court knew to be hostile. Despite this advance knowledge the court allowed the defense the belief that it would be permitted such cross examination. With the opportunity to abort these tactics and mitigate the damage the court chose to lie in ambush and frustrate the defense late in the trial. The error was of constitutional dimension, whose impact was most damaging.

THE FACTS

The facts as presented here, are sufficient to create the setting within which the errors occurred. On August 23 and September 11, 1973, Patrolman Ernest Mahone purchases small quantities of cocaine from the appellant at the Tatler's Bar in Manhattan. (24, 30) The initial sale was facilitated by Miss Ladd's introduction of Patrolman Mahone to Miss Guardi. (22-23) The second sale resulted from Mahone's activities. (28-29)

The appellant, a bar maid, had known Miss Ladd for approximately three years and had been, on numerous occasions, importuned by Miss Ladd to become a prostitute or to engage in a love affair with her. (116, 117) The offers became more menacing. Miss Guardi was subjected to physical abuse. (118) She was followed by unknown

men, and, from time to time, received threatening calls. (118, 120) More overtly, Miss Ladd, at the Tatler's Bar threatened disfigurement and a shooting if Miss Guardi did not comply with her demands to sell cocaine. (120) Submissively the appellant complied and the two cocaine transfers resulted.

POINT I

THE COURT'S RULINGS RESTRICTED THE SEARCH FOR THE TRUTH AND UNDULY HINDERED DEFENSE EFFORTS TO ESTABLISH ITS DEFENSE AS PROMISED. A FAIR TRIAL WAS DENIED.

The appellant's opening made it apparent that Miss Ladd's testimony was crucial to its cause. She had been a confidential informant and government employee for several years. (83) She had fruitfully cooperated with a number of Federal agents. (83, 93, 94) Miss Ladd joined forces with the government as a result of her efforts to extort money from a Frank Morden - money she alleged to have been stolen from her. (85) When apprehended in the company of her son and his friend who was found to possess a controlled substance her decision was made and her son released. (86, 87) The government, for its own reasons, announced that it would not call Miss Ladd, a right that it could exercise. United States v. Polisi, 416 F2d 573, 579 (2d. Cir. 1969)

To a limited extent defense counsel had some

awareness of Miss Ladd's testimony, having been supplied with her Grand Jury statements. (61) Suffice it to say grand jury material presents the bare bones of a witnesses' knowledge, the muscle and sinew to be supplied at trial. Counsel had also refused access to Miss Ladd prior to calling her as his witness as an exercise in futility. (62, 63, 64) The trial court warned that this largesse should not be abused by an effort to parade the witnesses' criminal history before the jury.[2]

The appellant was presented with another barrier. Miss Ladd's "rap sheet" was incomplete - its last notation had been made in 1956. (60, 64)

The appellant argued that she be allowed to cross-examine Miss Ladd in order - (1) to show the witnesses' motivation and (2) the reasons she compelled and coerced the appellant into illegal activities - reasons not revealed by her Grand Jury testimony. (65)

The trial judge warned that if the prospective witness denied the defense contentions, he would not permit counsel to probe twenty years back to impeach a witness whose testimony was known to him. (66-67) Yet counsel's knowledge of the prospective testimony was

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2. "The Court: I am not going to allow you to impeach your own witness and that is exactly the point of it".

restricted to the events leading to the sales.

Into this aura Miss Ladd appeared. A request was made that she be declared hostile. The application was denied (88) as was another when recall of Miss Ladd was asked. (149)

During Ladd's examination, after a request to probe the witnesses' criminal history, the trial judge characterized counsel's effort as a ploy to spread Ladd's criminality before the jury. (101, 102) The Court inferred that counsel's behavior was deliberate - done with the knowledge that the government's employee would not corroborate his client's version. (102)

The sole issue presented is whether the trial court prevented a fair trial when it repeatedly denied the appellant the opportunity to impeach a witness he had called and who was in his adversary's employ.

It is generally accepted that felony convictions and misdemeanors involving moral turpitude may be used to impeach the crediblity of a witness.[3] Roberson v. United States, 249 F 2d 737 (5th Cir. 1957), cert denied, 356 U.S. 919 (1958). See also United States v. Sanchez,

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3. Unfortunately the "rap sheet" proved futile because of its patent incompleteness which tended to frustrate the defense.

482 F2d 5, (5th Cir. 1973); United States v. Smith, 420 F2d 428 (5th Cir. 1970); 2 Wharton's Criminal Evidence 475 (13th ed. 1972); McCormick, Evidence Section 43 (1954). If impeachment were to be allowed, as it should have, Miss Ladd's criminal history was a legitimate weapon in the defense arsenal, a weapon blunted by the court.[4]

The trial judge was most concerned with the staleness of the conviction had against Miss Ladd. No doubt he was most mindful of this court's teaching in United States v. Palumbo 401 F2d 270 (2d. Cir. 1968), cert. denied, 394 U.S. 947 (1969) and United States v. Puco 453 F2d 539 (1971). In both these cases the thrust of the court's opinion was designed to protect a defendant, plagued with prior criminal convictions, who rose to testify on his own behalf. The trial judge was permitted to exercise sound discretion to determine whether the prejudice created outweighed the impeachment benefit. The factors to be considered were the nature of the conviction, its relation to veracity, its age and its

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4. "THE COURT: Let me finish. You are going back over twenty years and I will hold that having called this witness with full knowledge that she will deny certain allegations made by your client, the only purpose of calling her was to get the record before the jury. The record is more than twenty years old. I will not allow it". cf. Chambers v. Mississippi, 410 U.S. 284 (1973).

propensity to unduly influence the minds of the jurors. Neither Palumbo nor Puco was designed to protect the ordinary witness, albeit the hostile one, the paid governmental informant,[5] be the price paid freedom or gold.

The trial court's refusal to allow cross examination of Miss Ladd's criminal background was error. His ruling gathers no support from the record. The fact that the conviction that appeared was "over twenty years old" is not a sufficient reason to bar examination. It was obvious that the "rap sheet" was most incomplete and this incompleteness hampered the defense. Whether those convictions which were omitted were of a character spoken of in Palumbo and Puco is not known. Quite possibly they may have been of an age, of a character that might have influenced the jury. At a minimum the cause should be returned for further investigation and hearing.

Impeachment should have been allowed. The lower court's adherence to a dying doctrine that prohibits one from impeaching his own witness is a pointless restriction on the search for the truth. Counsel does not

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5. In both Palumbo and United States v. DiLorenzo, 429 F2d 216, 220 (2d Cir. 1970, cert. denied. 402 U.S. 950 (1971) more ancient convictions were used to impeach a defendant on the theory that the nature of the prior conviction bore directly on credibility.

hold out his witness as worthy of belief since he rarely has a free choice in his selection. To deny this right of impeachment leaves counsel at the mercy of the witness and his adversary. Proposed Federal Rules of Evidence (Rule 67) "When a defendant calls government agents to the stand in an effort to establish some part of his defense he should be given every reasonable leeway in bringing out whatever may be relevant to the issues before the jury. It is pointless to require a showing, such as the trial judge indicated might be necessary, that such witnesses are hostile". United States v. Freeman, 302 F2d 347, 351 (2d Cir. 1962) cert. denied 375 U.S. 958 (1963). This rule has received acceptance in United States v. Bryant, 461 F2d 912 (6th Cir. 1972); United States v. Lineberger, 444 F2d 122 (4th Cir. 1971), cert. denied 404 U.S. 1060 (1972); United States v. Torres, 477 F2d 922 (9th Cir. 1973); United States v. Fancher, 319 F2d 604, 605 (2d Cir. 1963).

The trial judge by ruling and attitude, chilled and then destroyed each effort to probe in depth facts that were germaine to the issues. Had counsel been allowed leeway in his examination of Ladd, her criminal convictions, undoubtedly effecting credibility, would also show the type of conviction, the sentence imposed and the length of time spent in prison - the latter bearing

directly on whether prison bars do bi-sexuals make.[6]

The court's failure to adhere to the teaching of **Freeman** (supra) and its failure to permit exposure of Miss Ladd's criminal record were errors that denied due process.

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL HAD.

Respectfully submitted,

Steven D. Slepian
Attorney for the Appellant

January 15th, 1975

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6. An incomplete "rap sheet" furnished the defense by the government does not assist the court. It is suggested that the court use its good offices to obtain the complete record to the end that a more cogent picture emerge.

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 16 day of Jan, 1975 deponent served the within Brief upon N.Y. Attorney

attonrye(s) for Appellee

in this action, at Foley Sq
N.Y.C.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
16 day of Jan, 1975.

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976